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NO. 02-165

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD A. BORGNER AND
THE AMERICAN ACADEMY OF IMPLANT
DENTISTRY,

Petitioners,

v.

THE FLORIDA BOARD OF DENTISTRY,
AND JOHN O. AGWUNOBI,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF AMICUS CURIAE, THE AMERICAN ACADEMY OF COSMETIC DENTISTRY, INC., IN SUPPORT OF THE PETITION

BRIAN D. WINTERS
Counsel of Record
DANIEL E. CONLEY
ROBERT J. PLUTA
Counsel for Amicus Curiae
The American Academy of
Cosmetic Dentistry, Inc.
Quarles & Brady, LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202-4497
(414) 277-5000

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae, the American Academy of Cosmetic Dentistry, Inc. (AACD), is a professional organization of some 5,000 members dedicated to advancing the art and science of cosmetic dentistry and encouraging the highest standards of ethical conduct and responsible patient care among cosmetic dentists.

The AACD seeks to fulfill its mission by offering superior educational opportunities to practitioners; serving as a user-friendly forum for the creative exchange of knowledge and ideas; and providing accurate and useful information to the public and the profession. Among its educational activities, the AACD holds annual scientific sessions for its members and publishes "The Journal of Cosmetic Dentistry." Through its charitable trust, the AACD also engages in charitable activities. These include its "Give Back a Smile" program, which provides consultation and treatment free of charge to people who have sustained dental injuries as a result of domestic violence.

The AACD is also the largest dental organization that offers a certification in cosmetic dentistry. AACD members who have satisfied the requirements, a process that typically takes three to five years, are entitled to identify themselves as "Accredited Members." Approximately 225 AACD members have achieved such certification.

The process of achieving "Accredited Member" status has three parts. The first is a written examination that tests the candidate in foundational knowledge of cosmetic dentistry. This test is administered at the annual scientific session in the

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[1] Written consent to the filing of this brief has been obtained from all parties and filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

presence of a representative of a testing agency. The educational testing and measurement consultant is also responsible for grading the test and presenting the results to the AACD's Board of Governors.

The second part of the accreditation process requires clinical case submissions and reports covering five specific types of corrective dental treatment. To submit clinical cases a candidate must have passed the written examination; must have attended three required workshops at the annual scientific sessions; must have attended at least half of the annual scientific sessions since taking the written examination; and must have maintained continuous membership in good standing in the AACD during the entire process. A panel of five examiners judges each case anonymously. When all five clinical case reports have received a passing grade, the candidate may proceed with the third phase of the process.

The third and final phase of the accreditation process consists of an oral examination on the clinical case submissions.

Amicus Curiae has a substantial interest in supporting the petition for certiorari. As explained below, Amicus Curiae believes that professional certification programs, such as its own and the one sponsored by Petitioner The American Academy of Implant Dentistry (AAID), make an important contribution to consumer welfare. The Florida statute harms consumers because, as a practical matter, it puts an end to the certification of dentists in Florida by non-state sanctioned organizations. And, importantly, this injury to consumer welfare is accomplished by a *de facto* ban on certain kinds of speech. The Court has made it clear that speech is privileged under our Constitution: "[G]overnment may not suppress speech as easily as it may suppress conduct, and . . . speech restrictions cannot be treated as simply another means that the government may use to achieve its ends." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512 (1996).

Amicus Curiae respectfully urges the Court to grant the petition for certiorari.

SUMMARY OF THE ARGUMENT

Amicus Curiae agrees with Petitioners and with various commentators that the Court should revisit the conceptual underpinnings of its "commercial free speech" jurisprudence. *See, e.g.*, Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627 (1990). This case provides a perfect opportunity for such a reexamination. At the very least, as Petitioners urge, "the time has come to provide additional guidance to the lower courts about the line between valid and invalid disclaimers as well as the requisite findings needed to sustain them." *Petition* at 27. Without such guidance, the statute at issue (and its potential imitators in other states and affecting other professions) put at risk the ability of legitimate organizations such as Petitioner AAID and Amicus Curiae to award professional credentials.

The credentials that such organizations make possible, and the communication of those credentials to consumers of professional services, play an important role in our economy. They provide an incentive for professionals to invest in expertise and they reduce the cost to consumers of searching for such expertise. As a consequence, the challenged statute not only violates the First Amendment, which violation is wrong in itself, but it also reduces consumer welfare. For these reasons, it should not be allowed to stand.

ARGUMENT

I. THE FLORIDA STATUTE FUNCTIONS AS A DE FACTO BAN ON COMMUNICATING THE FACT THAT ONE HAS PROFESSIONAL CREDENTIALS UNLESS SUCH CREDENTIALS HAVE BEEN SANCTIONED BY THE STATE.

A state may not ban the dissemination of accurate, factual information even if that information may be "potentially misleading" to some consumers. *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 108 (1990). The Florida statute is unconstitutional because it amounts to a *de facto* ban on disseminating information that, at worst, may be "potentially misleading."

Under the statute, a dentist practicing in Florida who has satisfied Amicus's requirements for certification in cosmetic dentistry may not state that she has been so certified, unless "in capital letters or some other manner deemed distinguishable from the rest of the announcement," appears the following "disclaimer":

"THE AMERICAN ACADEMY OF COSMETIC DENTISTRY IS NOT RECOGNIZED AS A BONA FIDE SPECIALTY ACCREDITING ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY."

Common sense tells us that a rational professional will not go to the trouble of communicating that she has been certified by an organization if she is required to exclaim in the very next breath "BUT THE ORGANIZATION THAT CERTIFIED ME IS NOT RECOGNIZED AS BONA FIDE". If the certifying organization is not "bona fide," then what is it? Justice Stevens answered that question in *Peel*, not as a matter of law but as a matter of ordinary linguistic intuition, when he distinguished "certifying boards that are *bona fide* and those that are *bogus*." 496 U.S. at 109 (emphasis added).

Because it is not in the interest of any professional to communicate a credential from an organization that has been labeled "bogus", such communication simply will not take place. The practical (and expected) result of the statute will have been to *ban* the dissemination of accurate, factual information about professional credentials because, allegedly, that information may be "potentially misleading." Such a *de facto* ban on truthful speech should not be permitted.

II. THE STATE'S DE FACTO BAN AGAINST COMMUNICATING A NON-STATE-SANCTIONED CREDENTIAL HARMS CONSUMERS.

Consumers benefit when professionals invest time, effort and money to increase their expertise. Everything else being equal, more investment will take place—and the benefit to consumers will be greater—if professionals can reap a tangible economic benefit from their investments. To reap an economic benefit from her investment in expertise, a professional must be able to communicate to the market in an efficient, credible way that she has indeed made such an investment. Professional credentials provide such a means of communication[2]. By imposing a *de facto* ban on communicating non-state-sanctioned credentials, the Florida statute reduces the economic return on investments in expertise. Lower return on investments means less investment, and less investment in expertise makes consumers worse off.

The statute harms consumers in another way. Professional credentials reduce consumers' search costs by making it easier for them to distinguish among those who offer their services for sale. Consumer search costs can be especially high in markets such as dental care (and health care in general) where the characteristics of the product cannot be easily observed prior to purchase.[3] Even if a credential does not convey in itself all relevant information, it efficiently sets the stage for productive inquiry by the consumer:

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[2] In this respect, and others, professional credentials are similar to trademarks. Justice Stevens noted this resemblance in *Peel*. 496 U.S. at 102.

[3] Economists refer to such products as "experience" goods. *See generally*, Phillip Nelson, *Advertising as Information*, 82 J. Pol. Econ. 729 (1974). Scholars have recognized that health care in general is an experience good. *See, e.g.*, David Dranove, *The Economic Evaluation of American Health Care* 10 (2000) (stating that "medical care may be the quintessential experience good.")

Consumer (on phone): I see here in the Yellow Pages that Dr. Smith is accredited by the American Academy of Cosmetic Dentistry. What exactly does that mean?

Dentist's Office Manager: We can send you a brochure or, if you have internet access, go to www.aacd.com.

A statute, like the one at issue here, that bans, or even chills, the communication of legitimate professional credentials thus harms consumers in two ways: it raises their search costs and it reduces the investments professionals will make to acquire expertise.

III. EVEN REGULATIONS SHORT OF A DE FACTO BAN CANNOT BE JUSTIFIED BECAUSE THE SPEECH IN QUESTION IS NOT "POTENTIALLY MISLEADING."

Because the speech in question is not actually or inherently misleading, the state may not ban it. It should not matter whether the ban is express or, as here, *de facto*. While the state could "enact measures short of a total ban to prevent deception or confusion" if the speech were "potentially misleading," *Peel*, 496 U.S. at 116, the state cannot simply cite that fear to justify its attack on First Amendment rights. This Court has recognized that "[i]f the protections afforded commercial speech are to retain their force, we cannot allow rote invocation of the words 'potentially misleading' to supplant the [state's] burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accounting*, 512 U.S. 136, 146 (internal quotation marks and citations omitted).

The harm recited here is not even that dentists holding specialized credentials from non-state-sanctioned organizations will mistreat consumers. The alleged harm is "that consumers

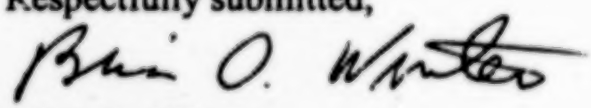
may be led into thinking that such a dentist enjoys state recognition and approval." Pet. App. 10a n.7. There are two problems with this. First, even if the possibility of such confusion could be demonstrated, Amicus Curiae agrees with Judge Wills that such "harm" is not constitutionally significant. Pet. App. 23a.

Second, the evidence is sparse that any such confusion is more than purely hypothetical. According to the trial court, the only "evidence" to support the constitutionality of a statute enacted in 1999 was a "very brief survey report" which was produced three years later and offered in this litigation at the eleventh hour. Because "the [survey] report fails to set out the precise questions that were asked of the respondents," Pet. App. 44a, one can only speculate as to whether the survey in fact documents a level of potential confusion sufficient to justify some form of regulation short of the state's *de facto* ban. It is hard to understand how, under such circumstances, the state can possibly have satisfied its burden.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,



Brian D. Winters
Counsel of Record
Daniel E. Conley
Robert J. Pluta
Counsel for Amicus Curiae
The American Academy of
Cosmetic Dentistry, Inc.
Quarles & Brady LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202-4497
(414) 277-5000